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SAN FRANCISCO, CA 94102-3298

April 22, 2020

Agenda ID #18358
Ratesetting

TO PARTIES OF RECORD IN APPLICATION 18-05-011:

This is the proposed decision of Administrative Law Judge Ehren D. Seybert. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's May 28, 2020 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, ex parte communications are prohibited pursuant to Rule 8.2(c)(4)(B).

/s/ S. PAT TSEN for

Anne E. Simon

Chief Administrative Law Judge

AES:avs

Attachment

Decision **PROPOSED DECISION OF ALJ SEYBERT** (Mailed 4/22/2020)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application
Liberty Utilities (Park Water) Corp.
(U314W) for an Order Authorizing
Liberty Utilities (Park Water) Corp. to
Purchase the City of Perris's
Municipal Water Systems.

Application 18-05-011

**DECISION DENYING THE RELIEFS REQUESTED IN THE APPLICATION FOR
PURCHASE OF THE CITY OF PERRIS' MUNICIPAL WATER SYSTEMS****Summary**

This decision denies the reliefs requested in the instant application by Liberty Utilities (Park Water) Corp. (Liberty) to purchase the City of Perris' Municipal Water Systems, and to provide water service to the customers in the Perris service territory. This decision does not prejudice the merits of Liberty's proposed purchase, nor does it preclude Liberty from seeking Commission approval for a similar request in the future. However, if Liberty files a similar request, it must reference the record in this proceeding and comply with the customer notice requirements in Public Utilities Code Section 10061(c)(4) and Commission Decision 99-10-064.

This proceeding is closed.

1. Factual Background

The City of Perris (City) currently serves 3,741 metered water customers in the Perris service territory, Riverside County, through two municipal water systems: The North Perris System and the Downtown System. Collectively, these systems are referred to as the Perris Municipal Water Systems (Perris MWS).¹ Approximately twenty percent of the City's population is served by Perris MWS, with the remainder served by the neighboring Eastern Municipal Water District (EMWD).²

The City issued a request for proposals (RFP) to purchase the North Perris and Downtown water and sewer systems in 2015. According to the City, the Perris MWS have been kept operational with subsidies from the City's General Fund for the past several years, which was a contributing factor in the decision to issue the RFP.³ Two water utilities – Liberty Utilities (Park Water) Corp. (Liberty) and Suburban Water Company – responded, with bids at \$16 million and \$11 million, respectively. Based on these bids, City staff worked with Liberty to negotiate the current proposed purchase price of \$11.5 million, which is less than Liberty's original bid, in part, since the current sale does not include the Perris sewer system.⁴

Because Liberty is proposing to acquire a municipal utility, a majority of voters must approve the acquisition in a special election.⁵ The City placed the issue of whether the acquisition should be approved on the ballot as

¹ Exhibit Liberty-1 at 1.

² Exhibit Liberty-3 at 7.

³ Exhibit Perris-1 at 4-5.

⁴ *Ibid*, Attachment 1, at 2-3.

⁵ Pub. Util. Code § 10061(c)(3).

“Measure H” for a special election held on November 7, 2017. Perris residents voted to approve the acquisition by a vote of 1,326 (63.29%) in favor to 769 opposed (36.71%).⁶

Liberty and the City finalized the Asset Purchase Agreement (APA), containing the terms and conditions of proposed acquisition, on December 19, 2017. On May 9, 2018, Liberty filed this application (Application) seeking Commission approval to purchase the City of Perris’ water utility assets. Included in Liberty’s Application are the following requests for relief:⁷

1. Approval of the terms and conditions of the APA, including the \$11.5 million purchase price;
2. Expansion of Liberty’s Certificate of Public Convenience and Necessity and to establish a service territory in Riverside County to provide water service to customers in the Perris service territory;
3. Establishment of a ten-year interim rate schedule for water service as the rates to be charged by Liberty to customers in the Perris service territory. As set forth in the APA, during the 10-year interim rate plan, customer rates will be adjusted on the closing date to the rates of EMWD then in effect, and will then be adjusted each year thereafter for a period of ten years to the greater of: (i) the percentage increase in EMWD rates or (ii) three and three-tenths percent (3.3%). In addition, Liberty may also increase rates to account for additional costs associated with changes in water supply arrangements, the cost of wholesale water, changes in the law, or damage or destruction of assets;⁸
4. Authorization for Liberty to file a Tier 1 Advice Letter to place into effect Perris MWS’ rates, based on the rates then in effect for comparable classes within EMWD;

⁶ Exhibit Perris-1, Attachment 2.

⁷ Application at 2.

⁸ Exhibit Liberty-1, Attachment Jackson-01: Asset Purchase Agreement, at Section 6.6(e).

5. Establishment of a rate base for assets consisting of the \$11.5 million cash purchase price that Liberty will pay for the Perris MWS; and,
6. Authorization for Liberty to establish a Perris ratemaking division consisting of the Perris MWS and, during a future Liberty General Rate Case (GRC) cycle, set rates for Perris MWS' former customers based upon a cost of service study. Cost of service rates will not go into effect prior to the ten-year interim rate plan described above.

1.1. Procedural Background

On May 9, 2018, Liberty filed the instant Application for authorization to purchase the Perris MWS, with a request that the Commission consider the Application on an expedited basis.⁹ On June 11, 2018, the Application was timely protested by the Public Advocates Office (Cal Advocates).¹⁰ Liberty filed a reply to the protest on June 21, 2018.

On August 10, 2018, the assigned Administrative Law Judge (ALJ) held a prehearing conference (PHC) to discuss the issues, schedule, and other matters relevant to the management of the proceeding. During the PHC, the California Water Association (CWA) requested, and was granted, a motion for party status. On February 12, 2019, the proceeding was reassigned from Commissioner Carla J. Peterman to Commissioner Genevieve Shiroma. On April 12, 2019, the City was granted party status. On May 22, 2019, the assigned Commissioner issued a Scoping Memo and Ruling (Scoping Memo), and determined that evidentiary hearing was needed.

⁹ Application at 20.

¹⁰ At the time the protest was filed, Cal Advocates was known as the Office of Ratepayer Advocates.

Evidentiary hearing was held on July 25, 2019. On August 13, 2019, Cal Advocates, and CWA, each filed an opening brief, while Liberty and the City filed a joint opening brief. On August 27, 2019, Cal Advocates filed a reply brief, and Liberty and the City jointly filed a reply brief. On August 30, 2019, Cal Advocates filed a motion to strike portions of the joint opening and reply briefs of Liberty and the City, and a motion to strike portions of the CWA's Opening Brief. On September 16, 2019, Liberty and the City filed a joint motion to take official notice of certain public documents.

On November 14, 2019, the Commission issued an order extending the statutory deadline of the proceeding from November 8, 2019 to May 8, 2020. On November 20, 2019, the proceeding was reassigned from ALJ Dan H. Burchum to ALJ Ehren Seybert.

2. Pre-Election Notice Requirements

Since Liberty is proposing to acquire a municipal water utility, (Public Utilities) Pub. Util. Code Section (§) 10061(c)(4) requires that the proposed sale first be approved by a majority of voters in a special election.¹¹ California Pub. Util. Code § 10061(c)(4) provides that:

The municipal corporation, public agency, water corporation, or sewer system corporation proposing to acquire a municipal corporation public utility for furnishing water or sewer service shall disclose to the customers of the public water or sewer system to be acquired, not less than 30 days prior to the date of election for formal approval of the acquisition, a written statement which includes all of the following:

¹¹ Pub. Util. Code § 10061(c)(3).

- (A) A summary of the price and terms of the proposed acquisition.
- (B) A comparison of the applicable water or sewer charges before and after the proposed acquisition.
- (C) The estimated savings to be achieved or additional costs expected to result, or both, from the proposed acquisition.¹²

The Commission adopted a similar notice requirement in Decision (D.) 99-10-064, which established guidelines for water utility acquisitions:

Notice of a proposed acquisition should be given to all affected customers at the time when any advice letter or application is filed with the Commission. Additionally, the notice should contain a comparison of the rates before the acquisition and for the first year after the acquisition...and identify any cost, including a reasonable return, not fully reflected in the first year's rates. With respect to the acquisition of a water system of a municipality, *similar notice should be given to all affected customers prior to any election*.¹³

Liberty, the City, and CWA assert that "tens of thousands of flyers" were mailed to City residents directing them to the www.CityofPerrisMeasureH.org website for information regarding the proposed purchase or Perris MWS.¹⁴ They also claim that this website provided links to the City of Perris' website, where customers had access to all the information required by Pub. Util. Code § 10061(c)(4) three months prior to the election.¹⁵

Specifically, Liberty and the City contend that the proposed \$11.5 million purchase price and 10-year interim rate plan was expressly noted on every flyer

¹² Pub. Util. Code § 10061(c)(4) (emphasis added).

¹³ D.99-10-064, Appendix D, at 3 (emphasis added).

¹⁴ Liberty and the City Joint Opening Brief at 6; CWA Opening Brief at 4.

¹⁵ Liberty and the City Joint Opening Brief at 6-8; CWA Opening Brief at 4-5.

that Liberty mailed to City residents, on the City Council Agendas and Staff Reports for the public meetings that took place on July 11 and July 27, 2017, and in the draft APA. Liberty and the City contend that the proposed \$11.5 million purchase price also reflects the estimated savings expected to result from the proposed acquisition.¹⁶

Regarding the comparison of rates before and after the acquisition, Liberty and the City claim that general information about rates was provided in the fliers mailed to City residents, which stated that the agreement “caps rates for a decade” and that “[r]ates will be similar with neighboring providers.”¹⁷ Further, Liberty and the City state that the July 11, 2017 City Council Agenda and Staff Reports explained that the Interim Rate Plan caps rates for a decade, with annual increases set to EMWD rates, or 3.3 percent, whichever is higher. According to Liberty and the City, full provision of the contract regarding the 10-year interim rate plan was also available in the draft APA. Lastly, a comparison of the projected rates between EMWD and a 10-year forecast of rates for Perris MWS if the proposed acquisition was approved was available on the City’s website.¹⁸

CWA argues that the substantive purpose of the notice requirements set forth in Pub. Util. Code § 10061(c)(4) and D.99-10-064 was to ensure that the public had the relevant information it needed to make an informed vote with respect to the proposed acquisition, and that the extensive materials made available prior to the special election accomplished this key purpose.¹⁹

¹⁶ *Ibid* at 8.

¹⁷ Exhibit PA-1 at Appendix G.

¹⁸ Liberty and the City Joint Opening Brief at 8.

¹⁹ CWA Opening Brief at 6.

Finally, Liberty and the City assert that, even if the pre-election disclosures were found to be inadequate, the Commission retains the authority to approve the Application notwithstanding a failure to comply with requirements of Pub. Util. Code § 10061(c)(4).²⁰ Moreover, the reasons that the City chose to pursue the proposed acquisition, as set forth in its testimony, reflect the fact that it would be in the public interest.²¹ Finally, since the vast majority of the City's population are EMWD's customers, whose rates would not be impacted by the acquisition, there is no reasonable basis to conclude that a different pre-election notice would have impacted the results of the election.²²

In contrast, Cal Advocates argues that customers were never given a comparison of rates pre- and post-acquisition, either in the City Council Agenda documents or in the Measure H campaign material, nor were customers informed of the additional costs that would result from the acquisition prior to voting in the November 7, 2017 election.²³

Prior to the November 7, 2017 election, Liberty mailed thousands of promotional "Yes on Measure H" campaign flyers to Perris residents.²⁴ Cal Advocates argues that the fliers and the "Yes on Measure H" website constitute campaign advertisements, meant to induce Perris residents to vote yes on Measure H, not to satisfy the written disclosure requirements of Pub. Util. Code § 10061(c)(4) and D.99.10-064.²⁵ The flyers themselves included statements

²⁰ *Ibid* at 10.

²¹ CWA Opening Brief at 3.

²² Liberty and the City Joint Opening Brief at 11.

²³ Cal Advocates Opening Brief at 13.

²⁴ Evidentiary Hearing Transcript at 43, lines 1-2.

²⁵ Cal Advocates Opening Brief at 14.

such as “[t]he Perris City Council and Mayor support Measure H to help Perris communities and families,” and that the acquisition “Puts a Cap on Water Rates,” “Eliminates Millions in City Debt,” and “Improves Parks for Perris Families.”²⁶ Neither the flyer nor the “Yes on Measure H” website provided a comparison of rates pre- and post-acquisition. They also failed to state what EMWD’s rates are, or that EMWD’s average rate increase has historically been 5.15%; did not contain information on additional charges, such as the California Alternative Rates for Water program surcharge; and, did not disclose the existence of the four rate adjustment categories.²⁷

Cal Advocates claims that the City Council Agenda documents and draft APA are similarly problematic: First, Liberty never informed residents that these documents existed, or were publicly available. The “Yes on Measure H” flyers directed residents to the “Yes on Measure H” website, not the City’s website. While the “Yes on Measure H” website did feature a link to the City’s website, it was to the City’s homepage, not the relevant City Council Agenda documents where the draft APA was considered. The City’s homepage also did not reference that this material was available, or even mention the acquisition.²⁸

Second, even if residents were able to find these documents, Cal Advocates argues that the City Council Agenda materials relating to the acquisition – the draft APA and Liberty’s initial response to the City’s RFP – do not provide the required Pub. Util. Code § 10061(c)(4) notice information. Liberty refers to Section 6.6(e) of the draft APA as satisfying Pub. Util. Code

²⁶ Exhibit PA-2 at Appendix G.

²⁷ Cal Advocates Opening Brief at 14-15.

²⁸ *Ibid* at 15.

§ 10061(c)(4)(B), but nothing in the section compares how a customer's rates or charges would change pre- and post-acquisition.²⁹

The City Council documents also include a letter from Liberty dated August 12, 2015 providing its initial responsive bid information to the City.³⁰ Cal Advocates argues that this letter pre-dates the actual APA, including the initial purchase price of \$16 million; that the "Rate Comparison" attachment to the letter is materially different from the tariff rates included in the Application, including a two-tier rate structure instead of a five-tier rate structure; and, that the initial bid's rate comparison tables do not include the existing Perris water systems' rate or associated bill estimates to show the expected impacts due to the acquisition.³¹

3. Discussion

Pub. Util. Code § 10061(c)(4) states that, prior to the sale of a public water or sewer system, customers must be provided with a written statement that includes information on price, terms, rate impacts, and estimated costs or savings resulting from the proposed acquisition. Without this information, voters cannot be expected to make an informed decision regarding the pending acquisition, nor understand how the proposed acquisition will impact customer rates.

The pre-election notice provided to Perris residents fails to meet this basic statutory requirement on two accounts: First, it is clear from the phrasing in Pub. Util. Code § 10061(c)(4), which states customers shall be provided "a written statement which includes all of the following," that the legislature intended all of the required information to be provided in a single, easily-accessible place.

²⁹ *Ibid* at 16-17.

³⁰ Exhibit Perris-1, Attachment 2, at 33.

³¹ *Ibid* at 17-18.

Instead, Perris voters were forced to piece together requisite information on the proposed acquisition through a myriad of sources, including flyers, two websites, City Council Agenda documents and Staff Reports, the draft APA, and Liberty's August 12, 2015 letter to the City providing its initial responsive bid. With few discernable public links between each of these sources of information, even the most determined voter would have a difficult time piecing the information together. Liberty and the City claim that mailing the above materials (comprising over 150 pages) to each of the approximately 70,000 City residents was not feasible.³² However, this argument is belied by the fact that on August 29, 2018, Liberty filed a three-page notice to Perris residents which, although also legally deficient,³³ is at least much more transparent and consistent with the requirements of Pub. Util. Code § 10061(c)(4) and D.99-10-064 than the pre-election disclosures.

Second, and as noted by Cal Advocates, even if residents were able to find all the above documents, there is nothing indicating how a customer's rates or bills would change pre- and post-acquisition. Liberty and the City point to various sources of information which indicate, with various levels of transparency, that rates will be similar to those of EMWD, and that annual rate increases will be capped for ten years at the higher of 3.3% or the increase to EMWD's rates. However, neither of these statements indicate how the City's current water rates compare to those of EMWD, while neither the fliers nor the "Yes on Measure H" website explain that EMWD's rates have historically increased by 5.15% annually.³⁴ Since customers of Perris MWS are not expected

³² Liberty and the City Joint Opening Brief at 7-8.

³³ See Cal Advocates Opening Brief at 18-21; Cal Advocates Reply Brief at 7 and 10-11.

³⁴ Exhibit PA-2, Appendix G, at 11.

to be accustomed to EMWD's rates, such a point of comparison is meaningless without additional information. This rate comparison is also important, since Liberty's Application proposes to increase commodity charges from a one-tier (North Perris System) and two-tier (Downtown System) rate structure to a four-tier rate structure,³⁵ while Liberty itself estimates the existing charge or charges before the acquisition would increase by 9.09% for North water system customers if the acquisition took place in 2018, and by more than 14% if the acquisition takes place in 2019.³⁶ These rates increases do not account for the Public Utilities Commission Reimbursement Fee or the surcharge to fund the California Alternative Rates for Water program.³⁷

Finally, the argument presented by Liberty and the City that Perris water system customers are of insufficient number to change election results, even with a different pre-election notice, is both misleading and entirely misses the point. There are more residential customers in Perris' municipal water system than voters who participated in the November 7, 2017 special election.³⁸ More importantly, Perris water system customers will be the ones paying for service under the proposed acquisition, and as such have a basic legal right to know how their rates will change. As a long-standing utility, Liberty should have been fully aware of this requirement.

4. Outstanding Motions

On August 30, 2019, Cal Advocates filed two motions. Its first motion moved to strike portions of the joint opening and reply briefs filed by Liberty

³⁵ Application at 10.

³⁶ *Ibid.*

³⁷ Cal Advocates Opening Brief at 17.

³⁸ Exhibit Perris-1, Attachment 2, at 16.

and the City; and its second motion moved to strike portions of the opening brief of CWA. On September 16, 2019, Liberty and the City filed a joint motion to take official notice of public documents. The issues cited in these motions are not relevant to the grounds of this decision; therefore, the motions are deemed moot and are denied.

5. Comments on Proposed Decision

The ALJ's proposed decision was mailed to the parties in accordance with Section 311 of the Public Utilities Code, and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed by _____. Reply comments were filed by _____.

6. Assignment of Proceeding

Genevieve Shiroma is the assigned Commissioner and Ehren D. Seybert is the assigned ALJ in this proceeding.

Findings of Fact

1. Pub. Util. Code § 10061(c)(4) and D.99-10-064 require that a written statement be provided to customers of a municipal water system at least thirty days prior to holding a special election to consider the proposed acquisition of that municipal water system.
2. Pub. Util. Code § 10061(c)(4) and D.99-10-064 require that the written statement contain the following information: The price and terms of the proposed acquisition, the applicable charges before and after the acquisition, and the estimated savings, costs, or both expected to result from the proposed acquisition.
3. The different sources of information that Liberty and the City rely upon in their effort to meet the requirements of Pub. Util. Code § 10061(c)(4) and

D.99-10-064 lack a coherent, publicly-available connection, such that voters would not easily be able to find them.

4. Perris residents were not provided information comparing the applicable water charges before and after the proposed acquisition prior to the November 7, 2017 special election.

Conclusions of Law

1. Liberty's pre-election notices regarding the acquisition of the City of Perris' municipal water systems fail to comply with Pub. Util. Code § 10061(c)(4) and D.99-10-064.

2. It is in the public interest for customers of a municipal water system to know how their rates will change prior to holding a special election on the proposed acquisition of that water system.

3. All outstanding motions in this proceeding are moot and should be denied.

4. The reliefs requested in the instant Application should be denied.

O R D E R

IT IS ORDERED that:

1. The reliefs requested in Liberty Utilities (Park Water) Corporation's Application 18-05-011 (requesting Commission authorization to purchase the City of Perris' municipal water systems) is denied.

2. Should Liberty Utilities (Park Water) Corporation file any future application seeking Commission authorization of the purchase the City of Perris' municipal water systems, it must reference the record in this proceeding.

3. All outstanding motions in this proceeding are denied.

4. Application 18-05-011 is closed.

This order is effective today.

Dated _____, at San Francisco, California.